IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE
WRIT PETITION NO.5832 OF 2004

Purushottam alias Nana U.
Sanyasi, aged 70 years,
Occ: Business, residing at
42/5, Karve Road, Piyusha
Complex, Eranawane, Pune-4. .... Petitioner

- Versus -

1. A.N. Jog,
age 55 years, Occ: Business,
Place of business, Swagat
Dining Hall, 42/5, Karve
Road, Ernadwane, Pune-4.

2. K.R. Shetty,
age 45 years, Occ: Business,
Place of business, Swagat
Dining Hall, 42/5, Karve
Road, Pune-411 004.

3. M.S. Khilare,
age 40 years, Occ: Business,
Place of business, Swagat
Dining Hall, 42/5, Karve
Road, Pune-411 004.

4. M.D. Agarwal (Om Prakash),
age 45 years, Occ: Business,
Place of business, Swagat
Dining Hall, 42/5, Karve
Road, Pune-411 004. .... Respondents

Sarvasri R.G. Ketkar for Rajdeep Khadapkar
for the Petitioner.

Shri S.N. Chandrachud for the Respondent
Nos.2 to 4.

**CORAM:** R.M.S. KHANDEPARKAR, J.

**DATED:** SEPTEMBER 20, 2004

**ORAL JUDGMENT:**

1. Heard. Rule. By consent, the rule is made returnable forthwith.

2. The petitioner challenges the order dated 26-2-2004 passed by the 13th Ad-hoc Addl. District Judge, Pune below Exhibit 8-A in Civil Application No.689 of 2003. By the impugned order, the lower Appellate Court has allowed the application for amendment of the written statement filed by the respondents.

3. While challenging the impugned order, the learned Advocate for the petitioner has submitted that by the impugned order the lower Appellate Court has allowed the party to change the case pleaded in the original pleadings and to introduce a totally new case, besides that the impugned order is contrary to the provisions of law in relation to the law of amendment as well as the law permitting the parties to rely upon additional evidence and particularly the documentary evidence at the appellate stage.

4. Undisputedly, the suit filed for eviction of the respondents by the petitioner was decreed by the trial Court. It is also a matter of record that the suit was sought to be contested by filing written statement by the respondent No.1 alone. The other respondents did not contest the suit before the trial Court. However,

all the respondents jointly filed the appeal before the lower Appellate Court challenging the decree of eviction.

5. It is also an undisputed fact that the suit was filed in the year 1997 on the ground of sub-letting and some other grounds. The contention of the petitioner is that the premises were sub-let by the respondent No.1 to the other respondents. The suit was decreed on 26-9-2003. The appeal was filed on 11-11-2003 along with an application for amendment of the written statement and the lower Appellate Court while dealing with the said application for amendment allowed the same by the impugned order. Hence the present petition.

6. The respondents sought to amend the written statement contending that much prior to the decretal of the suit and on 12-10-2001 a deed of assignment came to be executed by the respondent No.1 in favour of the respondent Nos.2 to 4 and the same was also registered on the same day. Pursuant to execution and registration of the assignment deed of the running business of the respondent No.1, it is the case of the respondents that the goodwill and the stock-in-trade of the respondent No.1 were transferred in favour of the other respondents and consequently the other respondents applied for various licences as required under the law from various

authorities including the Municipal Corporation, police department etc. It was their further contention in the application for amendment that though the goodwill and the stock-in-trade were transferred consequent to the execution and registration of the assignment deed, certain legal formalities were yet to be complied with which included the police licence and therefore the said fact was not disclosed in the written statement which was filed on 26-11-2997 in the said suit, though the case of the petitioner was denied simpliciter. In those circumstances, according to the respondents, the trial Court decreed the suit against the respondents by recording finding of illegal sub-letting of the suit premiss by the respondent No.1 in favour of the respondent Nos.2 to 4. It is further case of the respondents that having regard to the said assignment of running business with goodwill, stock-in-trade and tenancy rights, the transaction is not sub-letting and it will be in the interest of justice to permit the appellants to amend their written statement to bring on record the aforesaid facts relating to the assignment by the appellant No.1 of his running business along with transfer of stock-in-trade, goodwill and incidental transfer of tenancy right to the appellant. It was also further case of the respondents in the application for amendment that "The above amendment is on the point of law and based on facts already in existence on the date

of the suit. The same is not taking the plaintiff by any surprise whatsoever. The said pleading is in respect of the Regd. document in the form of public document entered into long back." It was also averred by the respondents in their application for amendment that "The defendants are ready to lead evidence in support of their amended pleadings in the Appellate Court even if the time of the judicial process is desired to be saved by the Appellate Court if the matter is not to be remanded back on ultimate trial on the amended pleadings.".

7. Drawing attention to the above quoted averments in the application and the fact that in the absence of the relevant documents great prejudice is being caused to the respondents, the learned Advocate for the respondents submitted that the application having been filed within the period of three years from the date of execution of the deed of assignment, it is neither barred by the law of limitation nor it can be said to cause any prejudice to the petitioner as the respondents are ready to co-operate with the Court in expediting the recording of evidence in relation to the pleadings which are proposed to be introduced by way of amendment in terms of the impugned order. According to the learned Advocate for the respondents, therefore, no fault can be found with the impugned order.

8. The amendment which has been proposed to be allowed by the impugned order undoubtedly relates to the fact pertaining to the assignment or running the business of the respondent No.1 along with the goodwill and stock-in-trade of the respondent No.1 in favour of the respondent Nos.2 to 4 and execution of a document in relation to such assignment which is stated to have been executed and registered on 12-10-2001. It is not in dispute that the suit was decreed prior to filing of the application for amendment and the application came to be filed only after the decretal of the suit and at the appellate stage. The application was filed along with the memo of the appeal. It is also not in dispute that the suit was contested solely by the respondent No.1 and the respondent Nos.3 and 4 had not even filed the written statement in the trial Court. It is also not in dispute that the respondents were not unaware of the alleged fact of assignment of the business along with goodwill and the stock-in-trade by the respondent No.1 in favour of the respondent Nos.3 and 4 to themselves prior to the disposal of the suit. It is not in dispute that the trial Court decreed the suit in the absence of any evidence to counter the contention of the petitioner regarding the illegal sub-letting of the premises and that the deed of assignment along with the fact of assignment of the business in the nature which is sought

to be disclosed by way of the proposed amended pleadings would be necessary and a very material and relevant document to justify interference of the Appellate Court in the order and decree of eviction passed by the trial Court on the ground of illegal sub-letting. Indeed, as already observed above, the specific averment in that regard in the application for amendment reads thus:-

> "In these circumstances, the trial Court decreed the suit against the appellants by recording finding of illegal sub-letting of suit premises by Appellant No.1 to appellant No.2 to 4. The appellants submit that having regard to the said assignment of running business with goodwill, stock-in-trade and tenancy rights, the transaction is not sub-letting and it will be in the interest of justice to permit the appellants to amend their written statement to bring no record the aforesaid facts relating to assignment by appellant No.1 of his running business alongwith transfer of stocks in trade, goodwill and incidental transfer of tenancy rights to the appellant Nos.2 to 4."

The above averment apparently discloses not only the knowledge of the fact of the alleged assignment of the running business by the respondent No.1 in favour of the respondent No.2 to all the respondents during the pendency of the suit but even regarding the fact of need of the said document on record before the trial Court to deny the relief in the nature of eviction of the respondents on the ground of illegal sub-letting of the suit premises. Inspite of these facts to the knowledge of the respondents during the trial, the application for amendment did not disclose any justification or explanation for the delay in bringing the said facts on record and the reasons for failure to bring the same on record before the trial Court before disposing the suit.

9. The Section 74 of the Indian Evidence Act, 1872 describes which documents would form public documents. The sub-section (1) thereof provides that the documents forming the acts, or records of the acts of the sovereign authority, of official bodies and tribunals, and of public officers, legislative, judicial and executive, of any part of India or of the Commonwealth, or of a foreign country are the public documents whereas the sub-section (2) of Section 74 provides that the public records kept in any State of private documents are also public documents. Merely because the public

records kept in the state of private documents are defined as public documents under Section 74 of the Evidence Act, that itself would not amount to contend that any document executed between two or more parties by itself would form a public document. The record pertaining to such document kept by the State though in the form of public record may form a public document, any such private document by itself cannot constitute to be a public document and it will continue to be a private document executed by the private parties. As such document would be a document enumerated under Section 75 of the Indian Evidence Act. Being so, merely because the deed of assignment is registered with the competent authority that deed itself would not partake the nature of a public document and it will continue to be a private document. A record relating to the execution of such deed maintained by the State however may be a public document bearing in mind the provision of law comprised under Section 74 of the Indian Evidence Act. Being so, the contention that the deed of assignment is a public document and therefore the petitioner would be taken by surprise by production of such document is to be rejected as being totally devoid of substance.

10. It is also to be noted herein that the proposed amendments are relating to the execution of the deed of

assignment dated 12-1-2001. In other words, the whole basis for moving the application for amendment is the said deed of assignment. Admittedly, the deed of assignment was executed prior to disposal of the suit. The evidence in support of the proposed amendment essentially includes the said document. Being so, the application though styled merely as application for amendment, it is necessary to consider whether it satisfies the requirement of Rule 27, Order 41 of the Code of Civil Procedure which deals with the subject of production of additional evidence at the appellate stage.

11. The sub-rule (1) of Rule 27 of Order 41 of the C.P.C. provides that the parties to an appeal shall not be entitled produce additional evidence, whether oral or documentary, in the Appellate Court, but if the Court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or (aa) the party seeking to produce additional evidence, establishes that notwithstanding the exercise of due diligence, such evidence was not within his knowledge or could not, after the exercise of due diligence, **be produced by him at the time when the decree appealed against was passed,** or (b) the Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any

other substantial cause, the Appellate Court may allow such evidence or document to be produced, or witness to be examined, and the sub-section (2) provides that whenever additional evidence is allowed to be produced by an Appellate Court, the Court shall record the reason for its admission. Obviously, it is not the case of the respondents that the document was sought to be produced before the trial Court and it was rejected by the trial Court. Hence the Clause (a) sub-rule (1) of Rule 27 will have no application to the matter in hand. Undisputedly, the lower Appellate Court itself has not found necessary to examine any document by itself or being necessary to enable it to pronounce the judgment or for any other substantial cause and therefore the Clause (b) of sub-rule (1) of Rule 27 also will have no application to the matter in hand.

12. At this stage, it is informed by the learned Advocate for the respondents that there was separate application filed under Order 41, Rule 27 of the C.P.C. and the same was disposed of allowing the same on the very day, which submission is seriously disputed by the learned Advocate for the petitioner. Be it as it may, it is not necessary to go in detail about the merits of such application, if filed by the respondents, suffice to say that while considering the application for amendment based on certain document which is stated to

have been executed and which is sought to be produced at the appellate stage, it is necessary for the Court dealing with such application to ascertain whether such evidence could be allowed to be placed on record at the appellate stage, bearing in mind the provisions of law comprised under Order 41, Rule 27 of the C.P.C. Apparently, the impugned order nowhere discloses any such exercise having been done by the Court below while granting the application for amendment and that itself would be a justification for interference in the impugned order.

13. As already pointed out above, the proposed amendment relates to the facts which are stated to have occurred, undoubtedly, after the filing of the suit, but before the disposal of the suit. Being so, merely because the application is filed within a period of three years from the date on which the facts sought to be introduced by way of the amendment would not justify the order allowing the application for amendment. It is necessary for the Court dealing with such application to consider whether there was sufficient opportunity for the applicant to approach the Court with the amendment application at any earlier point of time and this aspect is to be considered with all the required seriousness when such application is filed at the appellate stage. The impugned order nowhere discloses any such exercise

by the lower Appellate Court while allowing the application.

14. Undoubtedly, bearing in mind the principle of law under Order 6, Rule 17 of the C.P.C.., an amendment which is necessary to decide the real question in controversy is normally to be allowed. However, when such an application is made with the intention or purpose to defeat the right already accrued in favour of the other side, not only the point of limitation but even the justification for the delay, if any, disclosed by the applicant ought to be considered and in the absence of any such justification, an adverse inference will have to be drawn against the applicant which could even justify the rejection of the application for amendment.

15. In the case in hand, it is the case of the respondents themselves that in order to disprove the claim of the petitioner about sub-letting of the premises, the document of the alleged assignment of business executed and registered on 12-10-2001 was absolutely necessary and would make a lot of difference on the ultimate decision to be arrived at by the Court on the point of order of eviction on the ground of sub-letting. If that was to the knowledge of the applicant as has been contended by the respondents, it

was absolutely necessary for the respondents to disclose the justification for delay in filing such application and the reasons for not filing such application prior to the disposal of the case by the trial Court. The grounds given are only in the nature of absence of prejudice to the petitioner and non-completion of certain formalities in the form of police licence. However, it is the case of the respondents themselves in the application that even on the day when the application for amendment was filed, there was no police licence available with them. In other words, even on the date of filing of the application for amendment, certain formalities were yet to be completed. Obviously, the non-completion of the formalities was not the ground or justification for delay in filing the application.

16. As regards the prejudice to the petitioner, certainly the petitioner is armed with the decree in his favour and is on the ground of sub-letting of the premises by the respondent No.1 in favour of the respondent Nos.2 to 4. It is this very ground which is sought to be nullified with the help of the document dated 12-10-2001 and the alleged fact of assignment of business. In other words, the proposed amendment seeks to deny the right which has accrued in favour of the petitioner after having undergone the required procedure

prescribed for seeking eviction of the tenant on the ground of sub-letting. Added to this, as already stated above, this ground was clearly known to the respondents and the respondents were fully aware about the necessity of the nature of the evidence to defeat such ground and it is the case of the respondents themselves that such evidence was available with the respondents much prior to the disposal of the suit. The respondents having not disclosed any justifiable ground for not coming forward with the said evidence prior to the disposal of the suit and the grounds which have been given being absolutely untenable for the delay in approaching the Court, the impugned order allowing the amendment cannot be sustained and is liable to be set aside. Mere contention that the deed dated 12-10-2001 and the alleged fact of assignment of business would be sufficient to disprove the case of the petitioner regarding the sub-letting of the premises cannot be construed as sufficient to hold that the proposed amendment to be material and necessary within the meaning of the said expression under Order 6, Rule 17 of the C.P.C., in the facts and circumstances of the case.

17. In the result, therefore, the petition succeeds. The impugned order is hereby quashed and set aside. The application for amendment filed by the respondents being Exhibit 8-A in Civil Application No.689 of 2003 is

dismissed.

18. Before parting with the matter, it is necessary to take note of the misconception about the law on the part of the learned Appellate Court which is reflected from his observations in the impugned order. It has been observed by the learned Appellate Court as under:-

> "It cannot be ignored that the present litigation is between landlord and tenant, it cannot be ignored that tenant is always interested in prolonging the matter. Of course, when he is trying to prolong the matter with the help of law, none can deny his right and definitely tenant is entitled to protect his interest with the help of law upto last moment and I do not want to deny that right."

None can dispute that every party to the litigation has right to defend his right upto the last stage of the litigation and that right cannot be denied to any party. That does not mean that any of the parties to the litigation has right to prolong the matter or to delay the matter even by taking shelter of provisions of law. The law’s delays in whatever manner are to be condemned.

The Courts cannot be parties to any sort of tactics on the part of the litigants to delay proceedings before the Court and any attempt in that regard should not only be discouraged but should be penalised. Being so, irrespective of the fact whether the litigation is between the landlord and the tenant, neither the landlord nor the tenant can have a right to prolong the proceedings. In case any of the parties try to make any attempt in that regard, the Court should take prompt action against such attempt and should penalise the party who tries to prolong the matter merely for the sake of delaying the proceedings.

19. With the above observations, the rule is made absolute in above terms with no order as to costs.

20. Certified copy expedited.

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